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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 151

ISAAC CHAPMAN,

Petitioner,

vs.

R. J. HOAGE ET AL.,

Respondents.

PETITIONER'S REPLY BRIEF.

HARLAN WOOD,
JAMES P. DONOVAN,
Counsel for Petitioner.

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Counsel did not have before him at the time the Petition and Supporting Authorities were prepared the printed Transcript of the Record, and for that reason it may be helpful to the Court to have a chronological resumé of the case stated herein without any interpolation or deduction on the part of counsel.

(1) Petitioner was injured December 15, 1928 (R. 2). (Injuries to head, crushed right foot and nervous system; R. 24).

(2) Notice of Election filed June 10, 1929 (R. 2), under Section 33 of Act (R. 76) approved March 4, 1927, 44 Stat. 1424, as amended by Act approved May 17, 1928, 45 Stat. 600 (R. 74).

(3) Suit filed #76949 against Washington Railway and Electric Company, July 18, 1929, and damages ($3,000.00) recovered (R. 2).

(4) Judgment reversed May 8, 1933 (62 App. D. C. 140; 65 F. (2d) 486) and certiorari (316) denied October 9, 1933 (R. 5).

(5) Application for hearing before Employees' Compensation Commission renewed under election, March 1, 1934 (R. 3).

(6) Hearing was set for April 26, 1934, and continued indefinitely by the Deputy Commissioner (R. 2, 3).

(7) Application filed to proceed *in forma pauperis* and denied May 3, 1934 (R. 3, 7).

(8) Cause discontinued by præcipe May 9, 1934 (R. 3).

(9) Hearing resumed before Deputy Commissioner June 8, 1934 (R. 3, 17), and testimony taken.

(10) Compensation order filed by Deputy Commissioner June 27, 1935 (R. 10).

> "1. That the claimant, having filed his election to pursue his remedy against the third party and having failed to pursue his remedy to completion, has prejudiced the rights of the employer herein by allowing the statutory limit to run against any rights the employer might have had and the claimant therefore is not entitled to compensation within the meaning of the Act."

(11) On July 11, 1934, Petition for Mandatory Injunction to review the award was filed (R. 1) under Section 21, par. G, Act p. 14.

(12) Intervention of Indemnity Insurance Company of North America (R. 68), August 6, 1934.

(13) Motion to dismiss filed July 27, 1934 (R. 67), and September 7, 1934 (R. 69), on grounds "in accordance in

law" and "rights of intervenor were prejudiced by the running of the Statute of Limitations."

(14) Final Decree November 19, 1934 (R. 70).

(15) Appeal noted December 4, 1934 (R. 71), argued in Court of Appeals April 9, 1935 (R. 74); decided May 13, 1935 (R. 74); majority opinion (R. 74, etc.); minority opinion (R. 78, etc.).

Reply Argument and Authorities.

Counsel do not question that the findings of fact of the Deputy Commissioner supported by evidence are conclusive and not subject to be disturbed by the courts. By this same token, the absence of any evidence or facts to support a conclusion may be the subject of judicial inquiry and reference to the evidence. *Cohen* v. *Petty*, 62 App. D. C. 189, 190, 65 F. (2d) 822; *Indemnity Insurance Company of North America* v. *Hoage et al.*, 61 App. D. C. 173, 58 F. (2d) 1074. Therefore, in such matters as are subject to a conclusion of fact on the part of the Deputy Commissioner, his inquiry into the facts based upon substantial evidence may not be reviewed. The distinction is that "jurisdictional facts" may be reviewed.

The respondent has treated with indifference the proposition of law involving the right of subrogation and the necessity for the pleading of limitations as a defense. Subrogation does not involve a fantasy; it is more than a fiction; it is not a mere hope; it is a reality.

In this reply it will be as was the purpose of the petitioner in his petition to cast some light upon the subject matter involved in this litigation in order that a true and just construction of the Federal Statute may be had. The construction placed by the several States, as appears in the opinions from those States referred to in respondent's brief, leaves us still in pitch darkness.

A cursory and hurried reading of the Industrial and Compensation Acts cited in respondent's brief shows that they vary from one another and all differ from the Federal Statute now under consideration in the provisions and language used with respect to elections and "third party" actions.

To ilustrate, the Delaware Statute provides that the injured employee has the right of election, "but he shall not proceed against both," referring to a claim for compensation and a suit against a third party.

The Indiana Statute gives the employee a right of action against a "third party" but provides, and rightfully so, that collection may not be had from both the employer and a third party. The Massachusetts, Michigan, and Maryland Statutes are similar to the Delaware Statute. Without burdening the Court further with a differentiation between these varying Statutes of the several States, suffice it to say that none of them contain the permissive provisions of the Federal Statute, and the election must be made either prior to the filing of a claim for compensation or when made it becomes by the terms of such a Statute "final."

Great stress is laid upon quotations from the decisions of the Courts of New York. Suffice it to say that the provision of the Statute is dissimilar to the one now under consideration. Section 29 of the Compensation Laws of New York, among other things, provides, referring to an employee:

> "Shall, before any suit or any award under this chapter, elect whether to take compensation under this chapter or to pursue his remedy against such other."

Any construction of that Statute to make it similar to the one before the Court would of necessity be a strained

one. The provision of the New York Statute is *mandatory* or at least *directory* and the provision of the Federal Statute is *permissive*. To place a construction on the Federal Statute similar to the construction placed upon the Statute for the State of New York, this Court would have to disregard the permissive phases of section 33 of the Act under consideration and would have to entirely disregard paragraph f of section 33 of the Act, which makes a provision for a set-off in favor of the employer and a deficiency claim for the employee. It would further require the Court to read into the Act appropriate language requiring that when suit is instituted against a third party under the Federal Act, such suit must be reduced to a "judgment." The only penalty attached to any election under the Federal Statute is found in paragraph g of section 33 of the Act, which relates to a "compromise without the written approval of the employer."

Section 20 of the Act incorporates favorable presumptions for the injured employe which it is contended requires that the employer and his insurance carrier should affirmatively show not as a conclusion on the part of counsel, nor a conjecture on the part of the Deputy Commissioner, nor the Court that the right of subrogation involved something of substance rather than a mere legal formality or formal judgment of record. It may be pertinently asked, In what stronger position would the respondent have been had a retrial occurred in the Supreme Court of the District of Columbia with the evident necessity for a directed verdict against the petitioner and formal judgment issued thereon? What benefit would the latter action have conferred upon the respondent? It would have prolonged a barren controversy.

Conclusion.

Counsel for the respondent takes petitioner's counsel to task for a lack of industry in vigorously prosecuting his third party action and lack of good faith in the prosecution of the case and complains that it has been deprived of a right because the case was not tried by the respondent "with its own counsel in its own way." Respondent's brief 10, 29. No offense is taken at this observation on the part of respondent's counsel, who now appears in the case for the first time, although he is aware, as appears from his brief, that this Court on October 9, 1933, in Petition 316 (290 U. S. 661) denied this petitioner certiorari in his third party action, affirming in effect the judgment of the Court of Appeals, 62 App. D. C. 140, which held your petitioner guilty of contributory negligence as a matter of law, estopping him forever as a matter of fact from asserting any substantial claim against the third party, and by the same token exploding the theoretical claim of a "prejudiced right" of the respondent.

It is respectfully submitted that a proper and true construction of the Statute now under consideration to require that the Deputy Commissioner be directed by an appropriate order of the Supreme Court of the District of Columbia to make an award of compensation to the petitioner.

Respectfully submitted,

HARLAN WOOD,
J. P. DONOVAN,
Attorneys for Petitioner.

Service of copy of above acknowledged this 21st day of November, 1935.

FRANK H. MYERS,
Attorney for Respondent.

(7150-C)